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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 17-25)[1] are reported at 203 F.

[1] Each case has a separate record, but since all the cases involved a single and common ground, the court below wrote one

2d 699. The opinion of the District Court (R. 12-14) is not reported.

JURISDICTION

The judgments of the Court of Appeals were entered on April 10, 1953 (R. 25).[2] The petition for writs of certiorari was filed on April 30, 1953 and was granted on June 15, 1953 (R. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the failure of a perjury indictment to state the name of the person who administered the oath for an allegedly competent tribunal, and that he had authority to administer the oath, renders the indictment subject to dismissal for failure to state an offense.

STATUTES AND RULE INVOLVED

The pertinent statutes and Federal Rule of Criminal Procedure provide:

18 U.S.C. 1621:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, depo-

opinion covering all five cases. Accordingly, the opinion was printed only in the *Debrow* case and reference will be made to that record only.

[2] The judgments in other than the *Debrow* record appear at the following pages: Wilkinson, p. 19; Brashier, p. 17; Rogers, p. 11, and Jackson, p. 15.

sition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

Section 5396, Revised Statutes (18 U.S.C. [1940 ed.] 558), repealed by the Act of June 25, 1948, revising the Criminal Code (62 Stat. 683, 862):

> In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed.

Rule 7 (c) F.R. Crim. P.:

> NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * It need

not contain * * * any other matter not necessary to such statement. * * *

STATEMENT

In July, 1951, in the United States District Court for the Southern District of Mississippi, separate indictments were returned against respondents charging them with perjury violations under 18 U.S.C. 1621, *supra*, pp. 2-3 (R. 5-9). In pertinent respects the indictments were identical and charged as follows (R. 5):

> The defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true, * * *

Prior to trial, respondents moved to dismiss the indictments on the ground, *inter alia*, that the indictments, in failing to allege the name of the person who administered the oath and that he had authority to administer said oath, omitted some of the

essential elements of perjury (R. 9-11).[3] The District Court dismissed the indictments (R. 11). Despite its recognition that the provisions of Section 5396, Revised Statutes (18 U.S.C. [1940 ed.] 558) were no longer a part of our federal statutory law, the District Court, relying upon that statute and upon the decision of the Court of Appeals for the Fifth Circuit in *Hilliard v. United States*, 24 F. 2d 99, decided that allegations as to "who administered the oath and by what authority he acted" are still essential elements of a perjury charge (B. 12-14).

On appeal, the Court of Appeals, with one judge dissenting, affirmed the judgments of the District Court (R. 25). Holding that the repeal of Section 5396 did not change the fundamental rule that "every * * * essential element of the offense sought to be charged must * * * be alleged in the indictment," the court concluded that "it is essential to inform the accused by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity, and that he was in fact possessed of the requisite authority" (R. 21).

The dissenting judge, in agreement with the Gov-

[3] All except respondent Wilkinson raised the question generally in their written motions to dismiss. Wilkinson's motions did not raise this question. But in oral arguments before the court each of the respondents attacked the indictments specifically on the ground stated above.

In the *Rogers* record, the motion to dismiss appears at pp. 7-8; *Jackson*, pp. 8-12; *Brashier*, pp. 12-15; and *Wilkinson*, pp. 11-13.

ernment's position, considered the majority holding "extremely technical" and "contrary to the letter and spirit of the pertinent Federal Rules of Criminal Procedure" (R. 23). In the dissenting Judge's opinion, the allegation that respondents had "*duly* taken an oath before a competent tribunal" was a sufficient recitation of the essential facts required under Rule 7 (c), and the name and authority of the person administering the oath were merely details which were matters for proof on the trial (R. 24-25).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1) In ruling that the indictments were insufficient by reason of their failure to state the names of the persons who administered the oaths and the authority by which they acted; and

2) In dismissing the indictments.

SUMMARY OF ARGUMENT

A perjury indictment which alleges that an oath was duly taken before a named competent tribunal authorized by law to administer oaths fully informs the accused of the nature of the crime charged, as required by the VI Amendment and clearly states the "essential facts constituting the offense charged" as required by Rule 7 (c) of the Rules of Criminal Procedure. Under the rulings of this Court in *Hagner* v. *United States*, 285 U.S. 427, and other cases, the indictments in this case were therefore sufficient.

One of the essential elements in the crime of perjury is that an oath must have been taken before a

tribunal *or* person having authority to administer oaths in the matter involved. A perjury indictment must, therefore, identify the tribunal or person involved and allege its or his authority to administer the oath. This these indictments did by naming the Congressional Committee and asserting its authority by law to administer oaths. *United States* v. *Norris*, 300 U.S. 564. Since here the authority was vested in a tribunal, the name of the officer giving the oath did not have the significance it would have had if the perjury had been alleged to have occurred before an individual. There his name and authority would have been essential. *United States* v. *Bickford*, 168 F. 2d 26 (C.A. 9).

Under the simplified indictments contemplated by Rule 7 (c) of the Federal Rules of Criminal Procedure, it was clearly not necessary to allege more than the essential facts of the offense. But these indictments, which followed the language of the perjury statute and then supplied additional identifying facts, would have been sufficient even in the absence of the Rule. *Markham* v. *United States*, 160 U.S. 319. Certainly they were sufficient to inform the defendants of the offense charged so that they could defend themselves, and the facts were set forth with sufficient certainty to protect the defendants against another prosecution for the same offense. In comparable situations, the names of officials have not been required to be stated. *Roberts* v. *United States*, 137 F. 2d 412 (C.A. 4), certiorari denied, 320 U.S. 768; *United States* v. *Polakoff*, 112 F. 2d 888 (C.A. 2).

The reliance of the court below on its prior decision in *Hilliard* v. *United States*, 24 F. 2d 99 (C.A. 5), was not well placed. That decision was rendered while Section 5396 of the Revised Statutes was still in effect. That Section provided that in a perjury indictment it would be sufficient to set forth "by what court, *and* before whom the oath was taken [italics added]." In a dictum in the *Hilliard* case it was indicated that under that provision both the tribunal and the officer must be named. However, that Section has since been repealed and has no effect at the present time unless it recognized a pre-existing rule that both the court and its agent must be named. However, both the English statute from which it was derived (23 George II, Chap. 11, 20 Eng. Stat. 11) and our own Crimes Act of 1790 (1 Stat. 112, 116), which was its immediate ancestor, used the disjunctive pronoun "or" so that they read "by what court, *or* before whom" the oath was taken. In fact R.S. 5396 was itself generally so construed by the district courts. In any event, if it did change the law, it has been repealed and there is no present requirement that such an allegation be included in perjury indictments.

ARGUMENT

An Indictment Which Alleges That an Oath Was Duly Taken Before a Competent Tribunal, Setting Forth Its Name and Authority, Does Not Fail to State Essential Elements of the Offense of Perjury by Omitting to Name the Officer Administering the Oath and His Authority to Do So.

In order for an indictment to be sufficient it must inform the defendant "of the nature and cause of

the accusation" pursuant to the VI Amendment of the Constitution and must state "the essential facts constituting the offense charged" as required by Rule 7 (c) of the Federal Rules of Criminal Procedure, *supra*, pp. 3-4. This Court has stated in *Hagner* v. *United States*, 285 U.S. 427, 431:

> The true test of the sufficiency of an indictment is not whether it could have been more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochran and Sayre* v. *United States*, 157 U.S. 286, 290; *Rosen* v. *United States*, 161 U.S. 29, 34.

The issue in the present cases is not really the definiteness of the allegations included, but whether sufficient allegations were made to comprise all the elements of the crime involved. The essential elements of perjury are found in 18 U.S.C. 1621, *supra*, pp. 2-3, which defines the crime. They are (1) that an oath has been administered "before a competent tribunal, officer, *or* person" (italics added); (2) that false statements have been wilfully made; and (3) that the statements were material to the matter under investigation. *Markham* v. *United States*, 160 U.S. 319; *United States* v. *Norris*, 300 U.S. 564. There being no dispute that elements (2) and (3) were alleged in the indictments here involved, no further consideration will

be given to them. The sole issue is whether th indictments contained sufficient allegations wit respect to the oath when they alleged (R. 5) that

> * * * defendant herein, having duly take an oath before a competent tribunal, to wit: subcommittee of the Senate Committee o Expenditures in the Executive Department known as the Subcommittee on Investigations a duly created and authorized subcommittee o the United States Senate conducting officia hearings in the Southern District of Missis sippi, and inquiring in a matter then and ther pending before the said subcommittee in whic a law of the United States authorizes that a oath be administered, that he would testif truly, did unlawfully, knowingly and wilfully and contrary to said oath, state a material mat ter which he did not believe to be true * * *

A. *The Indictments State the Essential Element of the Offense*

On its face each indictment here involved allege the essential elements as to the taking of the oat and the authority of the tribunal to administer i Each indictment alleged that the defendant dul took an oath, before a competent tribunal, i. e. named Senate subcommittee, and that said sub committee was then inquiring into a matter pend ing before it in which an oath was authorized to b administered. These facts clearly show that a oath was charged to have been taken before named competent tribunal authorized to adminis ter oaths, since a Senate investigating committe

appointed and authorized to inquire and take testimony under oath, is a competent tribunal, and members of Congress are authorized to administer oaths to witnesses in any matter pending in any congressional committee. *United States* v. *Norris*, 300 U.S. 564, 573; *Meyers* v. *United States*, 171 F. 2d 800 (C.A. D.C.), certiorari denied, 336 U.S. 912; 2 U.S.C. 191.[4]

In this connection, it should be noted that 18 U.S.C. 1621 provides in the alternative that an oath be taken "before a competent tribunal, officer, *or* person," thereby in terms requiring only that an oath be administered before one of the three enumerated authorities. Accordingly under the statute, where the oath is taken before a tribunal or court, only the name of the tribunal or court must be alleged; where it is taken before a person such as a notary public or a justice of the peace, then the name or identity of the person administering the oath is important and must be alleged.[5] The rationale behind this distinction is valid. Where an

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[4] If the cases had gone to trial, the government would have had to prove the facts alleged. The transcript of the hearings before the Senate Committee indicates that the Government would have submitted evidence in one form or another to show that Senator Hoey administered the oath in each instance. See Hearings before the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments on Activities of the Mississippi Democratic Committee pursuant to S. Res. 51, 82d Cong., 1st Sess., pages 70, 298, 284, 371 and 42.

[5] The respondents, in their restatement of the question involved in their brief in opposition, appear to recognize this distinction as to courts (Br. in Opp. 1-2). They do not explain why a Senate committee or other competent tribunal should be treated differently.

oath is taken before a person who is not a member of a court or tribunal, an allegation that such person administered the oath is the only way that the authority before whom the oath was taken can be identified. This is not true where an oath is taken before a competent body. The majority opinion below, by requiring the name or official capacity of the person who administered the oath to be alleged even where an oath was administered before a competent body ignores the plain distinction made by the alternative language of the statute.

Rule 7(c) provides that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged" and that it "need not contain * * * any other matter not necessary to such statement." This rule which became effective on March 21, 1946 (Rule 59, F. R. Crim. P.), unquestionably applies to indictments for perjury. *United States* v. *Bickford*, 168 F. 2d 26 (C.A. 9); 4 Barron, *Federal Practice and Procedure*, Section 1914, pp. 69-70; cf. *United States* v. *Starks*, 6 F.R.D. 43 (S.D. N.Y.).

As indicated by the Advisory Committees' notes, the purpose of the Rule was to "introduce a simple form of indictment" which would allege only those facts necessary to establish the offense. See Arthur T. Vanderbilt, *New Rules of Federal Criminal Procedure*, 29 A.B.A.J. 376-377. The result to be achieved can be seen in Judge Alexander Holtzoff's article entitled *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 448-449, where he

sets forth an example of a murder indictment drafted prior to the adoption of the new rules and the same offense as it should be alleged under Rule 7(c). It will be seen that a thirty-five line indictment under the old procedure is reduced to four lines. The latter indictment, Judge Holtzoff concludes, is a good indictment under the present rules, which does not in any way cut down on the necessary allegations but which merely eliminates useless embellishments.

The simplified form of indictment of necessity requires the use of general terms to express ultimate facts. This was, however, permissible even before the adoption of the Federal Rules of Criminal Procedure and even under the old English law. *Brown* v. *United States*, 143 Fed. 60 (C.A. 8), certiorari denied, 202 U.S. 620. For example, in perjury indictments an allegation that the false statement was material without the pleading of facts from which this conclusion was drawn, was considered entirely proper and adequate. *Markham* v. *United States*, 160 U.S. 319; *Travis* v. *United States*, 123 F. 2d 268 (C.A. 10); 2 Chitty's *Criminal Law* (1847), p. 307; 4 Blackstone's *Commentaries*, Section 137, fn. 50. Consequently here the use of the words "duly" and "competent" in that portion of the indictment reading "having duly taken an oath before a competent tribunal," although generalizations by the pleader, are perfectly proper under Rule 7(c). As it happens, as shown above, the instant indictments contained more than just these conclusions.

By its terms, Rule 7(c) requires a pleading only of the substance of the offense. Generally, indictments framed merely in the language of the statute which charge the offense have been held sufficient. *United States* v. *Brig Neurea*, 19 How. 92, 94; *Smiley* v. *United States*, 181 F. 2d 505 (C.A. 9), certiorari denied, 340 U.S. 817-818; *Wendell* v. *United States*, 34 F. 2d 92, 93 (C.A. 4), certiorari denied, *sub nom. Leikin* v. *United States*, 280 U.S. 589. Here, the indictments contain more than the language of the statute.

The indictments here in every respect meet the basic requirements of a good indictment; they state facts sufficient to inform respondents of the offense with which they are charged so that they can properly defend themselves, and they do this with sufficient certainty to protect defendants against another prosecution for the same offense. *Berger* v. *United States*, 295 U.S. 78; *Hagner* v. *United States*, 285 U.S. 427, 431; *Hopper* v. *United States*, 142 F. 2d 181 (C.A. 9). As the dissent below said (R. 25), the failure to allege the name of the committee member who administered the oath can hardly be said to have prejudiced respondents or to have "made their defenses more difficult." The name of the officer who administered the oath is a detail of proof which need not be set forth in the indictment. Cf. *Olmstead* v. *United States*, 29 F. 2d 239 (C.A. 9), certiorari denied, 279 U.S. 849; *United States* v. *Polakoff*, 112 F. 2d 888, 890 (C.A. 2). If additional facts are required by a defendant in order to prepare his defense before trial, he may

resort to a bill of particulars. An indictment is certainly not deficient merely because it fails to disclose all of the information that may be required to be disclosed on a motion for a bill of particulars.

Since the decision below was rendered three district judges in the District of Columbia have held that indictments similar to the ones here involved were sufficient, specifically expressing their disagreement with the decision below. See decisions of the District Court for the District of Columbia in *United States* v. *E. Merl Young*, 113 F. Supp 20, by Judge McGuire on April 29, 1953; in *United States* v. *Lattimore*, 112 F. Supp. 507, by Judge Youngdahl on May 2, 1953; and in *United States* v. *Herschel Young*, No. 1725-51 by Judge Holtzoff on May 12, 1953. These cases involved identical allegations insofar as they are pertinent here. The two earlier decisions rejected the majority holding here as not being "persuasive" and accepted dissenting Judge Rives' holding as applicable to their cases. Judge McGuire stated that the dissent "stated the law as it is today, at least in the Federal courts, and he has both reason and basic common sense on his side." Judge Holtzoff, who was instrumental in preparing the rules of criminal procedure, in his opinion in *Herschel Young, supra*, said, that if it had not been for the decision in *Debrow*, he "would have been inclined to regard this objection as a sheer technicality bordering on the frivolous and the absurd, and to overrule it without discussion, perhaps citing Mr. Bumble as the sole authority." The validity of other such indictments were upheld

against similar attacks in the District Court for the District of Columbia by a fourth judge, Judge Schweinhaut, in *United States* v. *Rosenbaum*, No. 1722-51, on December 23, 1952, and in *United States* v. *Robert W. Dudley*, No. 1724-51, on May 15, 1953.

In comparable situations, the courts have held that the name of a particular person is not an essential fact which must be alleged in an indictment. Thus, in *Roberts* v. *United States*, 137 F. 2d 412, 414 (C.A. 4), certiorari denied, 320 U. S. 768, the court held that an indictment under the false claims statute (18 U.S.C. (1946 ed.) 80) which alleged that the claim had been presented to the Navy Department was sufficient without an allegation specifying the name of the officer to whom the claim was presented and his authority to pay the claim. In *United States* v. *Polakoff*, 112 F. 2d 888, 890 (C.A. 2), an allegation that the accused conspired "to influence and impede the official actions of officers in and of the United States District Court" was held sufficient although the indictment did not allege who the officers were that were to be so impeded. The court said, "we do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars."

Specifically in relation to perjury, the Court of Appeals for the Ninth Circuit held in *United States* v. *Bickford*, 168 F. 2d 26, that an indictment which alleged that a witness before a District Court had taken an oath before the clerk of that court was sufficient even though there was no allegation

that the clerk had authority to administer an oath. The court held that, since the authority of the clerk was implicit in the facts alleged, the indictment was sufficient under Rule 7(c).

Thus, by the standards of modern pleading as set forth in Rule 7(c) the indictments herein, which alleged all the elements of the offense as defined by the statute defining the offense, were sufficient.

B. *The court below misinterpreted the history and effect of R.S. 5396*

In support of its position, the majority below relied principally upon the provisions of Section 5396 of the Revised Statutes, *supra*, p. 3, and on its earlier decision in *Hilliard* v. *United States*, 24 F. 2d 99, which was decided under Section 5396, even though it recognized that this section had been expressly repealed in the 1948 revision of Title 18, Act of June 25, 1948, 62 Stat. 683, 862.

Section 5396 provided that:

> it shall be sufficient [in a perjury indictment] to set forth * * * by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same * * *.

The court below sought to avoid the impact of the statute's repeal by saying that its repeal did not destroy the requirement that a perjury indictment should state "by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity, and that he was in fact possessed of the requisite au-

thority" (R. 21). The court seems to be saying that the above-quoted provisions of Section 5396 merely gave recognition to preexisting essential elements of perjury not set forth in the perjury statute (18 U.S.C. 1621, *supra*, pp. 2-3), and that these essential elements survived the repeal of Section 5396. This analysis by the court below ignores the history of Section 5396.

Section 5396 was never intended to add to the definition of the crime of perjury. It was not a substantive law statute as the analysis of the court below suggests, but rather a procedural statute. It originated with the Crimes Act of April 30, 1790 (1 Stat. 112, 116, c. 9) and appeared in Section 19 of that Act. Section 19 in turn was copied verbatim in pertinent respects from English law, Act of 23 George II, Chap. 11 (20 Eng. Stat. 11) enacted in 1750. *Markham* v. *United States*, 160 U.S. 319, 323, 324; *United States* v. *Cuddy*, 39 Fed. 696, 697 (S.D. Cal.); 2 Wharton's *Criminal Law* (12th ed.) Section 1554. The English statute was passed "to render prosecutions for perjury, and subornation of perjury, more easy and effectual" [6]

[6] The statute provides: "Whereas by reason of difficulties attending prosecutions for perjury, and subornation of perjury, those heinous crimes have frequently gone unpunished, whereby wicked and evil-disposed persons are daily more and more emboldened to commit the same, to the great dishonour of God, and manifest let and hindrance of justice; for remedy whereof be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court,

by minimizing the matters to be pleaded in a perjury indictment. Prior thereto, perjury indictments had been needlessly prolix, and contained a detailed account of the proceedings in which perjury was alleged to have been committed including the pleadings and the evidence taken. Consequently it was difficult to draft a perjury indictment which contained all of these matters in proper form. Frequently prosecutions were unsuccessful not because of lack of guilt but because of variance as to unimportant details between the proof on trial and the allegations in the indictment. See 2 Chitty's *Criminal Law* (1847), p. 306.[1] Thus, the English Act and Section 5396 were not intended to affect or grant any substantive rights which because of their fundamental nature became ingrained into our federal laws. They were procedural statutes, the aim of which was to cut down on the matters to be pleaded. ***The King*** v. ***Dowlin,***

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or before whom the oath was taken (averring such court or person or persons, to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, other than as aforesaid; and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed; any law, usage, or custom to the contrary notwithstanding." (Italics added.)

[1] This result may have been desirable in the era when practically every felony was punishable by death and the courts took advantage of every technicality to avoid the death penalty. As the penalties became less stringent, these technicalities became outmoded and socially undesirable. See *United States* v. *Starks*, 6 F.R.D. 43 (S.D. N.Y.); Holtzoff, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 447.

proved the thesis that an indictment must set forth the identity of the person administering the oath and his authority. The authority to administer the oath may be charged either in words or by naming the office held so that the court may reach its own judgment as to authority.

That indictment charged Markham with having taken "a solemn oath before G. C. Lumas, then and there a special examiner of the Pension Bureau of the United States, and then and there a competent officer and having lawful authority to administer said oath" and this Court held it to be adequate.

In *United States v. Hall*, 131 U. S. 50, 33 L. Ed., 97, the Court discussed at length the statutory character of oaths and persons who could administer them. It adverted to the fact that "The statutes are full of such partial and special enactments about Notaries Public, Commissioners of the Circuit Courts, Clerks of the Courts, and various others by whom oaths may be administered", and reached the conclusion quoted by the court below that "It can hardly be supposed that a defendant indicted for perjury can be held to be guilty, unless the oath in regard to which the perjury is charged was taken before an officer of some kind having due authority to administer the oath."

The Court of the Fifth Circuit held that it was necessary to show before whom the oath was taken, and that the officer had authority to administer it in *Hillard v. United States*, 24 F (2) 99. The Court of Appeals of the Eighth Circuit, in *Danaher v. United States*, 39 F (2) 325,

5 T.R. 311, 317; *The King* v. *Perrott*, 2 M & S 379, 385.

While Section 5396 in the Revised Statutes provided that "it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, *and* before whom the oath was taken, * * *" (italics added), when Section 5396 was enacted for the first time in the Crimes Act of April 30, 1790, the word "or" appeared instead of the word "and" italicized above.[8] The English statute from which Section 5396 was copied likewise used the word "or" in that place instead of "and." We have been unable to find any explanation of the substitution of the word "and" in Section 5396 for the word "or." Our assumption is that at the time of the revision and codification in the revised statutes, the revisers or printers inadvertently used the word "and" in that connection. There is no indication that any change in the law was intended when the revised statutes were enacted. The word "and" in Section 5396

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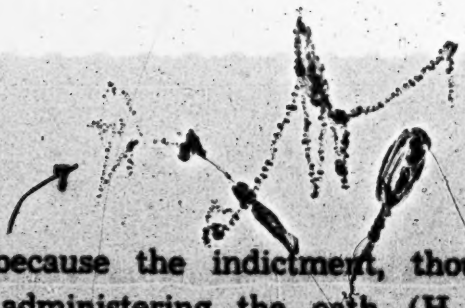
[8] 1 Stat. 116 provided:

"Sec. 19. *And be it [further] enacted*, That in every presentment or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath or affirmation was taken, (averring such court, or person or persons to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed."



reversed a conviction because the indictment, though naming the individual administering the oath (H. D. Irwin), did not sufficiently describe his status as United States Commissioner.

The Court of Appeals of the Tenth Circuit, in *Travis v. United States*, 123 F (2) 268, approved an indictment only because it set forth, not only the court in which the oath was taken, giving the number and style of the case, but also "set forth the name and official capacity of the person who administered the oath, charged that he was authorized by law to administer it . . ."

The Court of the Ninth Circuit, in *United States v. Bickford*, 168 F (2) 26, sustained a perjury indictment charging false swearing in a District Court only when the indictment charged that the false swearing took place after the defendant had "taken an oath as a witness before the said District Court which was administered by the Clerk of said Court. . ."

And the Court of the Third Circuit has held to be material "The averment that an oath has been administered and the averment of the one administering it." See *Levy v. United States*, 271 Fed. 942 and cf. *United States v. Doshen*, 133 F (2) 757.

Those cases recognize that tribunals cannot administer oaths and that a person must be given the oath by a human being holding an office empowering him to give the oath by specific provisions of a federal statute. No reported case from an appellate court has ever held the contrary.

has been interpreted to mean "or." *West* v. *United States*, 258 Fed. 413, 415 (C.A. 6); *United States* v. *Walsh*, 22 Fed. 644 (C.C. D. Mass.). The word "or" between the phrases "by what court" and "before whom the oath was taken" clearly indicated that an alternative was intended, and that where perjury was alleged before a court or a tribunal, as here, the name of the person administering the oath was not needed. See *West* v. *United States, supra*, at 414-415; *United States* v. *Howard*, 132 Fed. 325, 341-342 (W.D. Tenn.); *United States* v. *Walsh, supra*, which dealt with this question specifically; see also *Smith* v. *People*, 32 Colo. 251; *The State* v. *O'Hagan*, 38 Iowa 504; *Campbell* v. *The People*, 8 Wend. 636 (Ct. Cr. N.Y.); *State of Oregon* v. *Spencer*, 6 Or. 152, where indictments were upheld against the same attack involved here in that, like the instant cases, they alleged the name and authority of the body (court or tribunal) before whom the oath was taken, without designating the name of the person who administered it. Thus the original statute on which Section 5396 was based presented the same alternative as the present statute defining perjury, i.e. a competent tribunal *or* a person having competent authority to administer the oath. The interpretation of the instant indictments as sufficient is accordingly buttressed rather than negatived by the history of Section 5396.

Certainly, whatever was the proper construction of the "and" in R.S. 5396, that use of "and" is not now controlling. In repealing Section 5396, Con-

gress intended that it be superseded by Rule 7(c). S. Rep. No. 1620 (80th Cong., 2d Sess.), pp. 1-2 which in turn refers to H. Rep. No. 304 (80th Cong., 1st Sess.) pp. 8, 9; Barron, *Federal Practice and Procedure*, Section 1914. Therefore the sole governing statute here is 18 U.S.C. 1621 which does use the word "or" in defining the offense. As we have already shown, *supra*, pp. 8-17, the indictments here allege all the elements of perjury as found in that statute.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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